

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIRST APPELLATE DISTRICT**

**DIVISION FOUR**

ANTONIO NIEVES, JR.,  
Plaintiff and Appellant,

v.

CITY OF OAKLAND,  
Defendant and Respondent.

A144592

(Alameda County  
Super. Ct. No. RG-13677181)

**I.**

**INTRODUCTION**

Appellant Antonio Nieves, Jr. appeals the court's dismissal of his second amended complaint with prejudice. Appellant alleged violations of Labor Code sections 98.6 and 1102.5.<sup>1</sup> The court sustained the City of Oakland's (the City) demurrer because appellant had failed to allege: (1) any violation of state or federal law as required by both whistleblower statutes; and (2) that he had disclosed the information to anyone other than a suspected wrongdoer. The trial court sustained the demurrer without leave to amend<sup>2</sup>

---

<sup>1</sup> All subsequent statutory references are to the Labor Code unless otherwise identified.

<sup>2</sup> On appeal appellant does not contend that the trial court erred in not granting leave to amend.

after finding that appellant had been given three opportunities to properly allege violations of the Labor Code, and he could not do so. We affirm.

## **II.**

### **FACTUAL AND PROCEDURAL BACKGROUND**

Appellant was a part-time custodian for the City from 1998 to 2013.<sup>3</sup> In January 2013 appellant worked 11 hours of overtime, and in February he worked an additional 18 hours. During February and March 2013, appellant was not paid for the additional hours. He complained to his direct supervisor, Martin Sharp, and requested payment. He also complained to Steven Curiel, the City's facilities complex manager. In March 2013, appellant's employment was terminated. After his termination, he was paid for all hours worked.

#### **A. Complaint**

In April 2013, appellant filed a complaint against the City alleging three causes of action: (1) failure to pay minimum wage in violation of section 204; (2) retaliatory discharge in violation of section 98.6; and (3) wrongful termination in violation of public policy. In this original complaint, appellant asserted he was "never paid" for his extra hours. He also alleged that he was fired by Curiel with no explanation. He alleged his termination was in retaliation for his requests for payment.

The City filed a motion for judgment on the pleadings. The City argued section 204 did not apply to a public entity like the City. The Industrial Welfare Commission's Wage Orders (wage orders) also do not apply to a charter city like Oakland and appellant earned an hourly wage of \$20.50, which was substantially more than the minimum wage. The City contended that appellant could not bootstrap a retaliation claim under section 98.6 to his improper section 204 claim, and he had not alleged protected activity. Finally, the City argued that because it was a public entity, it could not be liable pursuant to the Government Code.

---

<sup>3</sup> Our facts are drawn from the allegations in appellant's three complaints.

The court granted the motion for judgment on the pleadings with leave to amend the first two claims. The court found that section 204 did not apply to the City. Further, the City is exempt from wage orders because it is a charter city with a unique status under article XI, section 5 of the California Constitution. As such, the City has exclusive authority to determine wages to be paid to its employees. The court granted appellant leave to amend to allege a claim under the Fair Labor Standards Act (FLSA). The court also granted leave to amend the cause of action under section 98.6 “to allege, if possible, facts in support of this cause of action.” The court granted the motion without leave to amend the third cause of action for wrongful termination in violation of public policy because such a claim cannot be asserted against a public entity.

### **B. First Amended Complaint**

Appellant filed a first amended complaint (FAC) alleging four causes of action: (1) failure to pay minimum wage in violation of the FLSA; (2) retaliatory discharge in violation of section 98.6; (3) retaliatory discharge in violation of section 1102.5; and (4) retaliatory discharge under the FLSA. Appellant’s allegations were similar to the original complaint, again alleging he was never paid for the extra hours he worked. He alleged he complained to Sharp and Curiel, and that they fired him in retaliation for his complaint.

The City filed a demurrer arguing the FLSA did not apply because appellant’s employment was not related to interstate commerce. It next argued that appellant’s claims under sections 98.6 and 1102.5 were not sufficiently pleaded because he had not alleged protected activity.

Appellant filed an opposition and declaration. In the declaration, contrary to his original complaint and FAC, he stated: “Sometime AFTER my termination, the [City] paid me all hours I had worked.” He stated that when he did not receive payment in February and March 2013, he complained directly to Curiel.

The court sustained the demurrer to the FAC without leave to amend as to the first and fourth causes of action under the FLSA. Appellant withdrew the first claim because he had been paid the amounts owed. For the second and third causes of action, the court

sustained the demurrer with leave to amend. The court found: “Defendant argues that because plaintiff[']s disclosures were exclusively internal they do not show any belief on plaintiff[']s part that he was disclosing a violation of state or federal law in any sort of whistleblowing context as required by the whistleblowing statutes of [L]abor[C]ode [sections] 98.6 or 1102.5. Defendant also alleges that plaintiff’s complaints were directed to alleged wrongdoer(s) here. [Citations.] Plaintiff has leave to clarify these issues and to explain the conduct in such a way so as to avoid a sham pleading in light of his declaration that he was subsequently paid for the amount owed sometime after his termination.”

### **C. Second Amended Complaint**

Appellant filed a second amended complaint (SAC) alleging two causes of action: (1) retaliatory discharge in violation of section 98.6; and (2) retaliatory discharge in violation of section 1102.5. In the SAC, appellant pleaded additional facts. He again alleged he complained to Sharp and “demanded his pay in what he reasonably and in good faith considered a violation of law: namely that the [City] could not request and accept his labor and refuse to pay him for it.” He also complained to Curiel, “the highest ranking person that plaintiff knew in his department.” From Curiel, he demanded to be paid immediately for the extra hours he worked. “The ONLY reason he contacted Mr. Curiel was to inform him that, for some unknown reason which will be the subject of discovery in this lawsuit, he had not been paid for his hours worked, and he was upset about it.” He alleges he was abruptly fired by Curiel, but he is “ignorant of the exact identity of the individual(s) within [the City] who was/were responsible for failing to pay him his wages owed in a timely manner.” For the section 1102.5 cause of action, he alleges: “Failure by an employer to pay its employees at least minimum wage is illegal.” He cites Wage Orders 5 - 2001 and MW-2014.

The City filed a demurrer to the SAC making the same arguments as its prior demurrer: appellant failed to allege facts sufficient to state a cause of action for protected activity or whistleblowing.

The trial court sustained the demurrer to the SAC without leave to amend. The court summarized the demurrer: “Defendant argues that because plaintiff’s disclosures were exclusively internal they do not show any belief on plaintiff’s part that he was disclosing a violation of state or federal law in any sort of whistleblowing context as required by the whistleblowing statutes of [L]abor [C]ode [sections] 98.6 or 1102.5. Also plaintiff has alleged that he complained to his supervisor, the alleged wrongdoer here, which is insufficient—the complaint has to be with someone other than the actual wrongdoer—to show that the complaint was about illegal activity. (See *Mize-Kurzman v. Marin Community College District* (2012) 202 Cal.App.4th 832, 858 [(*Mize-Kurzman*)].)” (Italics added.)

The court concluded that appellant had been given leave to “clarify these issues and to explain the conduct in such a way so as to avoid a sham pleading in light of his declaration that he was subsequently paid for the amount owed sometime after his termination,” and he failed to do so. “Plaintiff has changed his position from being fired by Mr. Sharp/Curiel to not knowing who terminated him, without sufficiently explaining the inconsistency. This issue[] along with the other problems explained herein and with the court’s orders in relation to plaintiff[’]s complaints lead the court to dismiss this case.”

### III.

#### DISCUSSION

##### A. Standard of Review

On review of a demurrer, we examine the complaint to determine whether it alleges facts sufficient to state a cause of action under any legal theory. (*McCall v. PacifiCare of California, Inc.* (2001) 25 Cal.4th 412, 415.) When a demurrer is sustained without leave to amend, “ ‘we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.’ [Citations.]” (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

“We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103 . . . ; *Aubry v. Tri–City Hospital Dist.* [(1992)] 2 Cal.4th [962], 967.) We are not bound by the trial court’s stated reasons, if any, supporting its ruling; we review the ruling, not its rationale. (*Sackett v. Wyatt* (1973) 32 Cal.App.3d 592, 598, fn. 2 . . . .)” (*Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, 631.)

#### **B. Retaliatory Discharge Under the Whistleblower Statute, Section 1102.5**

Appellant argues that he properly pled a cause of action under section 1102.5. “Labor Code section 1102.5, a whistleblower statute, prohibits an employer from adopting a policy to prevent an employee from divulging to a government or law enforcement agency information the employee reasonably believes discloses a violation of a state or federal law, retaliating against an employee who reveals such information to a governmental agency, or from retaliating against an employee who refuses to engage in conduct that would result in a violation of a statute. (Lab. Code, § 1102.5, subds. (a)–(c).)” (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648 (*Rope*), superseded by statute on other grounds in *Moore v. Regents of the University of California* (2016) 248 Cal.App.4th 216.)

“No particular definition of ‘disclosing information’ or ‘disclosure of information’ is provided in Labor Code section 1102.5.” (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 848.) “However, pursuant to subdivision (b) of that statute, the disclosure protected under section 1102.5 is one that is made ‘to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.’ (Lab. Code, § 1102.5, subd. (b).)” (*Mize-Kurzman, supra*, at p. 848.)

A public employee is protected under section 1102.5 “who reports legal violations to his or her own employer rather than to a separate public agency, where the employer or supervisor is not the suspected wrongdoer. [Citations.]” (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 857.) An “employee’s report to the employee’s supervisor about the

supervisor's own wrongdoing is not a 'disclosure' and is not protected whistleblowing activity, because the employer *already knows* about his or her wrongdoing [citations].” (*Id.* at p. 859.)

Generally, section 1102.5 does not protect a plaintiff who reports his suspicions directly to his employer. (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 649.) However, “[i]n contrast to an employee of a private employer, a plaintiff employed by a governmental agency . . . does not need to inform another governmental agency of the unlawful acts in order to qualify for whistleblower protection. [Citation.]” (*Edgerly v. City of Oakland* (2012) 211 Cal.App.4th 1191, 1199 (*Edgerly*).)

The trial court concluded that appellant failed to plead that he made the whistleblowing disclosure to a party who was not the suspected wrongdoer. (See *Mize-Kurzman, supra*, 202 Cal.App.4th at p. 857.) But, in reaching this conclusion, the lower court conflated two “wrongdoings” into one. The first wrong was the failure to pay appellant overtime wages, and the second was his termination of employment when he complained about the non-payment. It is the first wrongdoing that appellant alleged formed the basis of his whistleblowing complaint, and the second wrongdoing was the harm caused him as a result of his complaint.

It is alleged in the SAC that, upon informing Curiel appellant had not been paid the wages due him, Curiel terminated him. However, appellant did not plead, and it is unclear at this point what role, if any, Curiel played in the decision not to pay appellant wages he was due for working overtime. Indeed, in the SAC appellant alleged that he did not know who was responsible for failing to pay his wages in a timely manner. Thus, while all three complaints allege in various forms that either Sharp or Curiel, or both, were responsible for firing him, he did not allege that either was the wrongdoer who denied him owed wages—the wrong that was the underlying subject of the whistleblowing. Therefore, the demurrer could not properly be sustained on this ground.

However, more importantly, appellant's complaints to his direct supervisors about his late payment “do not rise to the level of whistle-blower retaliation.”

(*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 (*Mueller*).)  
“Protected activity is the disclosure of or opposition to ‘a violation of *state or federal statute*, or a violation or noncompliance with a *state or federal rule or regulation*.’  
(§ 1102.5, subds. (b) & (c), italics added.) In other words, ‘[s]ection 1102.5 of the Labor Code requires that to come within its provisions, the activity disclosed by an employee must violate a federal or state law, rule or regulation. [Citation.]’ . . .”  
(*Edgerly, supra*, 211 Cal.App.4th at p. 1199, quoting *Mueller, supra*, 176 Cal.App.4th at pp. 821-822.)

As noted, the City of Oakland is a charter city. The Charter of the City of Oakland (Oakland City Charter) states: “It is the intention of the people in adopting this section to take advantage of the provisions . . . of the Constitution of the State of California giving cities Home Rule as to municipal affairs.” (Oakland City Charter, art. I, § 106.) The Constitution provides that a city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws. (Cal. Const., art. XI, § 7.) The charter further states that it has “the right and power to make and enforce all laws and regulations in respect to municipal affairs.” (Oakland City Charter, art. I, § 106.

Consistent with the above provisions, section 4 of article XI of the California Constitution reads, in pertinent part: “ ‘County charters shall provide for: [¶] . . . [¶] (f) The fixing and regulation by governing bodies, by ordinance, of the appointment and number of assistants, deputies, clerks, attachés, and other persons to be employed, and for the prescribing and regulating by such bodies of the powers, duties, qualifications, *and compensation of such persons*, the times at which, and terms for which they shall be appointed, and *the manner of their appointment and removal*.’ ”  
(*Dimon v. County of Los Angeles* (2008) 166 Cal.App.4th 1276, 1281 (*Dimon*), italics added.) The determination of wages to be paid to employees of charter counties “is a matter of local rather than statewide concern.” (*Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 317.) Therefore, wage orders are inapplicable to the issue of employee compensation when it is a matter within the city’s

exclusive purview as a charter city. (*Dimon, supra*, at p. 1290.) “Charter cities are specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs.” (*State Building and Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 555.)

In *Edgerly*, this appellate division concluded the unambiguous statutory language of section 1102.5 requires a violation of state or federal statute, rule, or regulation. (*Edgerly, supra*, 211 Cal.App.4th at p. 1200.) The Legislature chose to omit references to local laws, which is apparent from comparing the language to other whistleblower statutes. (*Id.* at p. 1201.) “There is no question that section 1102.5 applies to charter city employees when the retaliation involves activities that violate a state statute or rule. Here, however, Edgerly’s section 1102.5 claim is premised on purported violations of *local laws*. Moreover, there is nothing in the City Charter, ordinances, or rules that even suggests these have the effect of state statutes.” (*Ibid.*, original italics.)

We went on to discuss the importance of courts not interfering with day-to-day municipal affairs untethered to state or federal mandates: “[T]here is no reason to micromanage the employment practices of a charter city, which is ‘specifically authorized by our state Constitution to govern [itself], free of state legislative intrusion, as to those matters deemed municipal affairs.’ ” (*Edgerly, supra*, 211 Cal.App.4th at p. 1204.) Thus, we concluded Edgerly’s claims governed by the city charter were “neither supported by the plain language of section 1102.5 nor the public policy considerations of that statute.” (*Id.* at p. 1205.)

The reviewing court reached a similar conclusion in *Mueller*. Mueller was a firefighter with the Los Angeles County Fire Department who sued his employer for whistleblower retaliation under section 1102.5, among other claims. He alleged in his complaint that he had “publicly stated his disapproval that two firefighters in the department . . . had been transferred, and thereafter their temporary replacements . . . retaliated against plaintiff for his having expressed his opinion [and] engaged in a continuing and systematic pattern of harassing plaintiff . . . .” (*Mueller, supra*, 176 Cal.App.4th at pp. 812-813.) The court found Mueller had failed to point to evidence

that he reported a violation of a state or federal law or regulation with respect to the transfer of the firefighters. (*Id.* at pp. 821–822.)

Like the *Edgerly* court, the panel in *Mueller* explained further the need to disengage from routine employment personnel issues: “Last, but certainly not least, the activities of the department personnel of which plaintiff complains in his suit do not rise to the level of whistle-blower retaliation. Matters such as transferring employees, writing up employees, and counseling employees are personnel matters. ‘To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected “whistleblowers” arising from the routine workings and communications of the job site. [Citation.]’ (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1385 [(*Patten*)).]” (*Mueller, supra*, 176 Cal.App.4th at p. 822.)

In *Patten, supra*, 134 Cal.App.4th 1378, the court concluded that disclosures by a school principal were not protected under section 1102.5 because two of the disclosures were “internal personnel matters involving a superior and her employee, rather than the disclosure of a legal violation[,]” and the third was “made in an exclusively internal administrative context” and did not “show any belief on Patten’s part that she was disclosing a violation of state or federal law in any sort of whistleblowing context[.]” (*Patten*, at p. 1385, italics omitted.)

The same is true here. Appellant’s disclosures involved a simple internal complaint about the City’s failure to pay him overtime wages. While important to appellant, this was a personnel matter particular to him involving only an apparent oversight in not paying for overtime hours he worked during two months. Nor was it protected activity under section 1102.5 because it was not the disclosure of a violation of a state or federal statute or regulation. (See *Edgerly, supra*, 211 Cal.App.4th at p. 1199; *Mueller, supra*, 176 Cal.App.4th at pp. 821-822).

Yet despite these irrefutable legal conclusions, appellant notes it was enough that he alleged he had a reasonable belief that his demand for overtime pay concerned a

violation of a state or federal law. Appellant's SAC alleges: "[Appellant] demanded his pay in what he reasonably and in good faith considered a violation of law: namely [the City] could not request and accept his labor and refuse to pay him for it."

A similar argument was rejected in *Carter v. Escondido Union High School Dist.* (2007) 148 Cal.App.4th 922 (*Carter*). There, Carter disclosed information about another coach's training tactics to the athletic director. The court concluded: "First, as explained above, the information disclosed by Carter did not 'disclose[ ] a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.' (§ 1102.5, subd. (b); see *Love v. Motion Industries, Inc.* (N.D. Cal. 2004) 309 F.Supp.2d 1128, 1134 [(*Love*)] ['Plaintiff's disclosure does not meet the standard for protected activity under Section 1102.5(b), because the disclosed activity does not violate any federal or state statute, rule, or regulation'].") Second, Carter's conversation with [the athletic director] was not motivated by his belief that a law had been broken. . . . Third, even if Carter subjectively believed that [the coach] had violated a statute or regulation, . . . the record is devoid of anything that would support a conclusion that his belief was 'reasonable.' " (*Id.* at p. 933.)

Similarly, in *Rope*, Rope alleged he was wrongfully terminated because he requested leave under the Michelle Maykin Memorial Donation Protection Act, and he was fired two days before the act became effective. (*Rope, supra*, 220 Cal.App.4th at p. 642.) Rope made requests to his supervisor and the human resources department. (*Id.* at p. 643.) The court concluded: "Rope has not pleaded and cannot plead a viable whistleblower claim because he does not claim either that he reported his suspicions of unlawful activity to any governmental agency, or that he refused to violate the law. Rather, he alleged only that he complained to [his employer] itself about its foot-dragging and failure to approve his leave. Such an internal complaint does not trigger whistleblower protection under Labor Code section 1102.5. [Citation.]" (*Rope*, at pp. 648-649.)

The SAC simply stated that the City could not accept appellant's labor and refuse to pay him, but there is no support for appellant's assertions his failure to be paid was

based on a violation of state or federal law. As in *Carter*, appellant did not disclose a violation of the law to Sharp or Curiel; he merely requested his overtime payment. There is no allegation that appellant's conversations with Sharp or Curiel were "motivated by his belief that a law had been broken" rather than just an internal administrative or payroll problem. (See *Carter, supra*, 148 Cal.App.4th at p. 933.)

Moreover, "even if [appellant] subjectively believed that [the City] had violated a statute or regulation . . . the record is devoid of anything that would support a conclusion that his belief was 'reasonable.' " (*Carter, supra*, 148 Cal.App.4th at p. 933.) "To have a reasonably based suspicion of illegal activity, the employee must be able to point to some legal foundation for his suspicion—some statute, rule or regulation which may have been violated by the conduct he disclosed. [Citation.]" (*Jadwin v. County of Kern* (E.D. Cal. 2009) 610 F.Supp.2d 1129, 1154.) Appellant cannot simply argue that "he reasonably believed that the activity violated some unnamed statute, rule, or regulation." (*Love, supra*, 309 F.Supp.2d at p. 1135.)

Here, appellant did not and could not allege that he had reasonable cause to believe that the City's failure to timely pay his overtime wages was illegal activity under state or federal law. If he "perceived violations" of the law at all, they necessarily were at most violations of the Oakland City Charter or the City's own policies, for to believe otherwise would not have been reasonable. (See *Mueller, supra*, 176 Cal.App.4th at p. 822; see also *Dimon, supra*, 166 Cal.App.4th at p. 1290.)

For all of these reasons we conclude that appellant failed to state a claim for retaliatory discharge under section 1102.5, and the trial court did not err in sustaining the City's demurrer to that cause of action.

### **C. Retaliatory Discharge under Section 98.6**

Appellant argues he alleged sufficient facts for retaliatory discharge under section 98.6. We begin our analysis by determining which version of the statute properly applies here. The facts in appellant's complaint occurred from January to March 2013, but he cites to the 2014 version of section 98.6 that went into effect in January 2014.

The 2013 version of section 98.6, which was in effect at the time of appellant's complaint, provided: "No person shall discharge an employee or in any manner discriminate against any employee or applicant for employment because the employee or applicant engaged in any conduct," including lawful conduct during non-working hours (§ 96, subd. (k)), for his/her political affiliation (§ 1101), for filing a complaint with the Labor Commissioner or a civil action, or for testifying in any proceeding. (Former § 98.6.) It further provided "no employer shall discharge or discriminate against any employee because he engaged in conduct protected under the Labor Code." (See *Rope*, *supra*, 220 Cal.App.4th at p. 649; former § 98.6<sup>4</sup>).)

The *current* version of section 98.6, which became effective in 2014, states: "A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, *including . . . because the employee or applicant for employment . . . made a written or oral complaint that he or she is owed unpaid wages[.]*" (§ 98.6, subd. (a), italics added.)

Whether an amended statute applies retroactively to a pending case is an issue we review de novo. (*Satyadi v. West Contra Costa Healthcare Dist.* (2014) 232 Cal.App.4th 1022, 1028.) " '[I]t is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.' . . ." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207 (*Evangelatos*), quoting *Aetna Casualty & Surety Co. v. Industrial Acc. Commission* (1947) 30 Cal.2d 388, 393 (*Aetna*)). "[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application." (*Evangelatos*, at p. 1209.)

---

<sup>4</sup> On August 28, 2015, this court granted the City's request for judicial notice of the former version of section 98.6, as well as the legislative history. (Evid. Code, §§ 451, 452, 453 & 459.)

While there is no express language in the amended version of the statute about retroactivity, the legislative history to the 2014 amendment discussed the expansion of the statute: “This bill would also prohibit an employer from retaliating or taking adverse action against any employee or applicant for employment because the employee or applicant has engaged in protected conduct. *The bill would expand the protected conduct to include a written or oral complaint by an employee that he or she is owed unpaid wages.* The bill would provide that an employee who was retaliated against or otherwise was subjected to an adverse action is entitled to reinstatement and reimbursement for lost wages.” (11 Cal. Legis. Serv. 2013, Assem. Bill. No. 268 (2013-2014 Reg. Sess.), Legis. Counsel’s Digest, ch. 732, § 1, p. 5451, italics added.)

Respondent argues that the legislative history shows no intent by the Legislature to apply the amendments retroactively. “[I]t must be assumed that the Legislature was acquainted with the settled rules of statutory interpretation, and that it would have expressly provided for retrospective operation of the amendment if it had so intended.” (*Aetna, supra*, 30 Cal.2d at p. 396.) Given the purpose of the amendment was to “expand” the protected conduct, we cannot presume it was meant to be applied retroactively. “Every change in the law brings about some difference in treatment as a result of the prospective operation of the amendment.” (*Id.* at p. 395.)

Appellant does not argue the retroactivity issue, but rather argues the City did not raise this issue in the trial court. We have discretion to consider a new argument or theory on appeal when it is a question of law and the facts are not disputed. (*Resolution Trust Corp. v. Winslow* (1992) 9 Cal.App.4th 1799, 1809.) We exercise our discretion to consider this question of law, and determine that appellant has not properly alleged a violation of the 2013 version of section 98.6.<sup>5</sup> It is clear from the 2014 amendment that the whistleblower law was expanded to include claims about unpaid wages, which were

---

<sup>5</sup> In exercising our discretion to decide this question, we are mindful that if we do not consider it, the case will be remanded to the trial court and respondent doubtlessly would raise the issue by way of motion for summary judgment or adjudication, thereby unnecessarily adding to the cost to all parties of resolving this litigation.

not within that law when appellant made his complaint for overtime pay. (*Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 77, 87 [“we find the Legislature did not intend section 98.6 to establish public policy against terminations for conduct not protected under the Labor Code”].)

As outlined in section III.B., *ante*, because the City is a charter city and governed by its own regulations, other Labor Code sections governing the payment of wages “do not apply to the payment of wages of employees directly employed by any county, incorporated city, or town or other municipal corporation.” (§ 220, subd. (b).) For this reason alone, the trial court correctly sustained respondent’s demurrer to the SAC.

Even if the former version of section 98.6 contemplated a potential whistleblower claim based on unpaid overtime wages, other provisions of the Labor Code dealing with overtime wages do not apply to the City. For example, the SAC references Wage Order 5- 2001.<sup>6</sup> Wage Order 5- 2001, section 1(C) states: “Except as provided in Sections 1, 2, 4, 10, and 20, the provisions of this order shall not apply to any employees directly employed by the State or any political subdivision thereof, including any city, county, or special district.” Section 4, which *is* applicable to charter cities, provides for the payment minimum wages: “(A) Every employer shall pay to each employee wages not less than nine dollars (\$9.00) per hour for all hours worked, effective July 1, 2014, and not less than ten dollars (\$10.00) per hour for all hours worked, effective January 1, 2016 . . . . [¶] (B) *Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.*” (Italics added.) If appellant’s claims were based on the City’s failure to pay him minimum wage or to pay his salary on his regular payday, then section 4 of Wage

---

<sup>6</sup> “I[n]dustrial ]W[age ]C[ommission] wage order No. 5–2001 governs the ‘Public Housekeeping Industry,’ [and] is codified at California Code of Regulations, title 8, section 11050. Wage Order No. 5[–2001] requires employers to provide overtime pay to employees working more than eight hours in one day or 40 hours in one week[.]” (*Martinez v. Joe’s Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 373.)

Order 5- 2001 would properly apply. But, appellant has not alleged he was paid below the minimum wage, and the City contends he was paid substantially more than the minimum wage at a rate of \$20.50 per hour. He has also not alleged the City failed to pay his regular wages in a timely fashion as required under section 4.

Instead, appellant's claim is based on the City's failure to pay him only overtime wages. Section 3 of Wage Order 5- 2001 governing "Hours and Days of Work," which expressly covers the payment of overtime, does *not* apply to the City. Section 3, unlike section 4, has not been made applicable to public employees. Overtime pay is a matter of "compensation" and "such compensation matters are of local rather than statewide concern." (*Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 643 ["Appellants cite no authority to support their contention that overtime pay is not a part of a charter county's compensation powers"].)

Finally, as with appellant's cause of action pleaded under section 1102.5 (§ III.B., *ante*), we agree with the trial court's conclusion that the SAC does not properly allege that appellant was "disclosing a violation of state or federal law in any sort of whistleblowing context." Rather than finding that appellant's disclosure was based on his belief that some illegal activity was occurring, the trial court correctly concluded that appellant was concerned only that he had not received his overtime wages in a timely fashion. He simply never alleged the delay in payment was based on some illegal or criminal conduct by the city (rather than simply a payroll error).

Thus, appellant was not acting as a whistleblower. As he states in the SAC, he made an administrative request to Sharp and Curiel to pay him his overtime wages. This was a routine request related to the administration of payroll, and was not actionable under section 98.6. (See *Patten, supra*, 134 Cal.App.4th at p. 1385 [plaintiff's request

“indisputably encompassed only the context of *internal personnel matters* involving a supervisor and her employee, rather than the disclosure of a legal violation”].)<sup>7</sup>

Therefore, the trial court correctly sustained the demurrer as to the cause of action alleging a violation of his protected whistleblowing activity under section 98.6.

#### **IV.**

#### **DISPOSITION**

The judgment is affirmed.

---

<sup>7</sup> Appellant does not have a viable claim under federal or state law, but he could have sought redress under the Oakland City Charter, which has provisions covering retaliation against an employee. (See Oakland City Charter, Title 2, chapters 2.32.070, 2.28.120.) The charter expressly provides for employee complaints to the City for reinstatement, injunctive relief, or damages. (Oakland City Charter, Title 2, chapter 2.32.080.)

---

RUVOLO, P. J.

I concur:

---

REARDON, J.

**RIVERA, J., dissenting:**

The majority concludes that appellant Antonio Nieves, Jr. has not stated a claim under the whistleblower statutes because when the City of Oakland (the City) failed to pay him it did not violate state or federal law, including Industrial Welfare Commission Wage Order 5-2001 (Wage Order). My colleagues reason that, because section 3 of the Wage Order, governing overtime pay, does not apply to charter cities, it cannot be said that the City violated any law or regulation in failing timely to pay appellant for the overtime work he did.

I disagree with that analysis.

The Wage Order has limited application to charter cities. But, as the majority acknowledges, five sections of the Wage Order do apply to public employers such as the City. (See Maj. Opn., *ante*, at pp. 15–16.) One of them is section 4, which requires employers to pay “to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period.” (Wage Order, § 4(B).)<sup>8</sup> While it is true that section 3 of the Wage Order, governing the definition and amount of overtime, does not apply to the City, that fact is irrelevant. This is not a claim that the City failed to characterize or calculate appellant’s overtime in accordance with section 3; it is a claim for *nonpayment* of wages due. That claim is governed by section 4; it requires the employer to pay “*not less than*” minimum wage “on the established payday for the period involved for all hours worked in the payroll period.” (Wage Order, § 4(B).) Section 4 does not merely set a floor (minimum wage) on the amount to be paid; it also establishes a requirement of timely payment of any wages due for all hours worked in the payroll period. It therefore applies here, to appellant’s unpaid wages.<sup>9</sup> Examined in light of this analysis, appellant’s pleading is not legally deficient.

---

<sup>8</sup> Public employers are also subject to penalties for violation of the provisions of the Wage Order. (Wage Order, § 20.)

<sup>9</sup> The majority also appears to interpret section 4 of the Wage Order as requiring the City to pay only “regular wages” in a timely fashion. (Maj. Opn., *ante*, at p. 16.) If this were correct, section 4 would require the City to pay its employees for their regular

In the second amended complaint appellant alleged that he worked 11 hours of overtime in January 2013 and 18 hours of overtime in February 2013 for which he was not paid during February or March; that he complained to a supervisor and a manager about the non-payment of wages; that he “demanded his pay in what he reasonably and in good faith considered a violation of law: namely the [City] could not request and accept his labor and refuse to pay him for it”; and that he was terminated in retaliation for his complaints about non-payment of wages. These allegations are minimally adequate to state a whistleblower claim for violation of section 4 of the Wage Order. They are also wholly consonant with the spirit of the subsequent amendment to Labor Code section 98.6, which now includes the discharge of an employee for “ma[king] a written or oral complaint that he or she is owed unpaid wages” as a violation of that section.

In addition to concluding that the City committed no violation of the Wage Order, the majority agreed with the trial court’s finding that appellant’s disclosure was not based on his belief that some illegal activity was occurring but was motivated by his concern that he had not received his overtime wages in a timely fashion. According to the majority, appellant “simply never alleged the delay in payment was based on some illegal or criminal conduct by the City (rather than simply a payroll error).” (Maj. Opn., *ante*, at p. 16.) But the pleading quite plainly alleges appellant reasonably believed the City was violating the law when it did not pay him. Whether appellant pleads that he believed the nonpayment was “based on” illegal conduct or “was” illegal conduct seems too fine a distinction for testing the sufficiency of a pleading. In any event, at this stage of the proceedings it was premature for the trial court to venture a “finding” as to just what appellant was attempting to do in making his complaint to his superiors.

It may be that a whistleblower claim in this circumstance is beyond reach in the proof of it. And it may be that any redress to which appellant might be entitled would more appropriately be pursued under the regulatory scheme in the Oakland City Charter

---

hours on the established payday but would not require the City to pay, on the established payday, for any overtime hours they worked in the same pay period. The plain language of section 4 belies this illogical interpretation. (Wage Order, § 4.)

(see Maj. Opn., *ante*, at p. 17, fn. 6). But the only question we are asked to answer is whether the complaint on its face contains a bare-bones whistleblower claim that should not have been dismissed. In my view, it does.

---

Rivera, J.

A144592